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Supreme Court of the United States

October Term, 1968

No. [redacted] 145

DAVID LEE WILLIAMS, TERRY DONALD MARTIN and DONNA LEE COOK,

Petitioners,

versus

United States

~~STATE OF LOUISIANA~~,

Respondent.

Petition for Writ of Certiorari to Review Decision of the United States Court of Appeals for the Fifth Circuit, No. 23,517.

G. W. GILL, SR.,
GEO. M. LEPPERT,
1707 Pere Marquette Bldg.,
New Orleans, La.,
Phone: 524-0147,
Attorneys for Petitioners.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, David Lee Williams, Terry Donald Martin and Donna Lee Cook pray that a writ of certiorari issue to the United States Court of Appeal for the Fifth Circuit to review the judgment of that Court entered on the 15th day of March, 1968, rehearing denied May 2, 1968. By virtue of said judgment petitioners were sentenced to serve penitentiary sentences ranging from three to twenty years based upon alleged violations of the Federal Kidnapping Statute discussed below. The proceedings below are entitled: *United States of America vs. David Lee Williams, Terry Donald Martin and Donna Lee Cook,*

No. 23517 of the docket of the Court of Appeals for the Fifth Circuit.

CITATIONS TO THE OPINION BELOW.

The Opinion below is as yet unreported and is to be found in the Appendix.

JURISDICTIONAL STATEMENT.

The opinion of the Fifth Circuit Court of Appeals was rendered March 15, 1968 and rehearing denied May 2, 1968. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Were petitioners deprived of due process of law by reason of the admission into evidence of a highly inculpatory statement by one of the petitioners made a month after his arrest without the laying of a predicate as to the voluntary nature of said statement out of the presence of the jury?

2. Were petitioners denied due process of law by virtue of the highly improper questions and remarks during voir dire examination of prospective jurors?

3. Were petitioners denied due process by virtue of the highly inflammatory and emotional appeals made to the jury during oral argument?

STATUTES INVOLVED.

The Due Process Clause of the Fifth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE.

This case involved a prosecution under Title 18, U.S.C. Sec. 1201(a). The three appellants were charged with having kidnapped a young woman, Carol Ann McGill and taken her from Port Arthur, Texas to the outskirts of New Orleans, La. and attempted to hold her there for the purpose of having her engage in prostitution.

The alleged victim, Carol Ann McGill, was a former bar maid who, by her own admission, had voluntarily engaged in prostitution (R. 64). She had lived openly with the defendant Williams as his wife, had also passed him off as her husband to her grandparents in Port Arthur and had spent the night there with him, in the connected apartment, all to the full knowledge of said grandparents (R. 48, 49, 58, 84). The prosecutrix had previously gone with defendant Williams voluntarily to Louisiana, where she had practiced prostitution and she had been permitted to return to Texas to the home of her grandparents so as to be with her children for the Christmas holidays (R. 78 through 85).

On the trip in question, when she was allegedly abducted, she made a long distance call en route and told her grandfather to call off the police search for her because she was all right (R. 93).

When she arrived in Louisiana at the Bissonet Apartments she had sexual intercourse with the defendant Williams, who was drunk, as were the other two defendants. She simply ran out of the apartment while the others were in a drunken stupor (R. 95).

Thus, while we are not specifically urging the sufficiency, of the evidence, the above facts are necessary in order to show the highly equivocal nature of the background evidence as to an actual kidnapping. This background is necessary to demonstrate the highly prejudicial effect of certain evidence which was admitted and certain inflammatory remarks made to the jury, noted below.

The most prejudicial aspect of the case was the action of the District Court in failing to require an inquiry out of the presence of the jury as to the voluntary nature of an obviously prejudicial and highly incriminatory statement made by the defendant, Williams, *more than a month after he was arrested, and while in custody in Beaumont.* This occurred in the following manner:

Mike Curnan, a Deputy from the Sheriff's office in Jefferson County, Texas, was a Government witness who was put on the stand for the sole purpose of stat-

ing that, while in custody there, the defendant Williams ADMITTED HE WAS A PIMP. Thus (R. 158):

Q. Do you know the defendant, David Williams?
A. Yes, sir.
Q. Do you know who (sic) his occupation is?
A. Yes, sir.
Q. What is it?
A. He's a pimp.
Q. How do you know that?
A. He told me.

MR. ANDREWS:
May it please the Court?
Counsel objects to this line of questioning since the time and necessary predicate has not been laid as to what this officer is testifying to.

THE COURT:
Objection overruled.

Q. When did he tell you this?
A. On February 9th of 1966.
Q. Did he voluntarily state this?
A. Yes, sir, he did.
Q. He was under no force, duress or anything else, just voluntarily made the statement?
A. Just a voluntary statement, yes, sir.

MR. McADAMS:
I pass the witness.

THE COURT:

Anything further?

CROSS EXAMINATION.

QUESTIONS BY ANDREWS:

Q. Did Mr. Williams walk up to you and voluntarily tell you he was a pimp?

A. No, sir, he didn't.

Q. Is he in the custody, in the Jefferson County jail?

A. Yes, he was.

Q. Is he in solitary custody there?

A. I don't know what kind of custody he's in up there.

Q. How did you have occasion to gain access to him?

A. I went up to the jail and brought him out, brought him to my office to fingerprint and mug him.

Q. You are a fingerprint technician?

A. Yes, sir.

Q. Do you recall the surrounding talk between you all prior to this alleged admission on the part of Williams?

A. Yes, I remember it.

Q. Who first started talking?

A. I did.

Q. What if anything did you say?

A. I asked him his name first.

Q. Did he reply?

A. Yes, sir.

Q. What did he reply?

A. He told me he was David Lee Williams.

Q. What is the next thing, if anything, took place?

A. I think I asked him what color did he call his hair, what color were his eyes, general description?

Q. I have no further questions, Your Honor.

DELIBERATE PLAN TO SUPPLY ESSENTIAL EVIDENCE BY ILLEGAL MEANS.

The Court correctly charged the jury that an essential element of the offense, which the government must prove, was that she was abducted and held against her will for the purpose of forcing her into prostitution. Specifically, on the third required element, the Court charged (R. 252):

> "The third element which reads: 'carried away and held for ransom or reward or for any other reason'. In this case it would be *for the purpose of forcing the complaining witness Carol Ann McGill into prostitution against her will.*" (Emphasis added.)

The Government well knew, therefore, that part of its burden of proof was a strong showing that the abduction was part of a plan to force the prosecutrix into prostitution. With the above evidence in mind, therefore, the Government clearly recognized that, with this sort of flighty, wild young woman as its sole witness *as to the purpose of the abduction*, and to dis-

tinguish its case from just another brawl between a prostitute and her man, it was necessary to get something more sinister before the jury. It was necessary to get the "pimp" image clearly before the jury. This campaign to inject the "pimp" image before the jury began at the very outset, during the voir dire examination.

AN HONEST MISTAKE?

On page 19 of its brief to the Fifth Circuit the Government sought to excuse the highly improper voir dire tactics as being the "honest effort of an inexperienced prosecuting attorney to secure fair and unbiased jurors *for the appellants as well as the Government*". (Emphasis added.)

This excuse appears as thin as a high style model on a Metrecal diet. Let us see just what happened:

The prosecutor opened his *voir dire examination* with a thinly disguised speech in which he stated (R. 7):

> "This is a case which you will hear today, Ladies and Gentlemen, and *it is a case which I think involves one of the most sinister diabolic plans and it will probably have language* to appear in the testimony*****"

Here there was an objection and motion for a mistrial, which was denied, with no cautionary advice by the Court as to the impropriety of making an

opening statement during voir dire or the impropriety of a prosecutor expressing his personal estimate of the "diabolical" nature of the case.

There follows one of many questions, which the Government in its brief assures us was simply an "honest effort" to get jurors who would be fair to the defense as well as to the Government (R. 7):

> "MR. RUTH:
>
> Ladies and gentlemen, I am going to direct this question to you—to this panel particularly because there are ladies on the panel. ARE THERE ANY OF YOU WHOSE SENSITIVITY IS SO GREAT THAT IF YOU WERE TO HEAR THE WORDS 'PIMP', 'PROSTITUTE', 'PROSTITUTION' 'RAPE' AND WORDS OF THAT NATURE, WOULD IT INCENSE YOUR SENSITIVITY TO SUCH AN EXTENT THAT YOU COULD NOT RENDER A FAIR AND IMPARTIAL VERDICT IN THIS MATTER TO BOTH THE UNITED STATES AND TO THE DEFENDANTS?"

There was a vigorous objection by the defense as to the form of this question, which was promptly overruled, without comment or caution by the Court (R. 8).

Encouraged by lack of any reprimand, the prosecutor proceeded to repeat the above question in a milder, paraphrase form (R. 8, 9) and then started

to make a full blown speech as to what the evidence would show. Here he was finally stopped from making a speech by the Court (R. 10).

IMMEDIATELY THEREAFTER THE PROSECUTOR RETURNED TO HIS "PIMP" QUESTIONS ON VOIR DIRE. THUS (R. 10):

"MR. RUTH:

Ladies and gentlemen, if the evidence as introduced here to show that one of the defendants, David Lee Williams, is a self admitted pimp, would that in any sense affect you giving a fair and impartial verdict to either the Government or Mr. Williams in this matter?

MR. ANDREWS:

MAY IT PLEASE THE COURT, COUNSEL AGAIN MOVES AND RULES FOR A MISTRIAL. THE ATTORNEY FOR THE UNITED STATES HAS GONE FAR BEYOND THE SCOPE AND PURPOSE ON VOIR DIRE TO EMPANEL A JURY."

THE COURT, HOWEVER, REBUKED, NOT THE PROSECUTOR BUT DEFENSE COUNSEL. Thus (R. 10):

"THE COURT:

Just make your objection, Mr. Andrews.

MR. ANDREWS:

Counsel objects, Your Honor, and moves for a mistrial.

THE COURT:

You've already said that. You only have to make your objections, not your argument. All right, the objection is overruled. Let's see if we can proceed."

Still unrebuked, the prosecutor for the third time launched into his "pimp questions" on voir dire (R. 11).

When defense counsel sought to object again, the Court, instead of correcting the prosecutor, *simply shut off further objections by directing that further objection would be unnecessary because the defense would be given the benefit of a continuing objection* (R. 12).

Thereupon, the unimpeded prosecutor continued along the same line until finally, when he tried to use the same type of voir dire question as to the former life of the prosecutrix as a prostitute, the Court became weary of this unorthodox procedure and made him desist (R. 13).

Other examples of inflammatory and prejudicial remarks of the same nature, during argument, are noted in a separate assignment of error below. But the foregoing samples are mentioned here to show that the injection of the "pimp" image was no mere accident chargeable to an overheated and inexperienced prosecutor. On the contrary, these tactics were adopted deliberately, from the opening gun and

were pursued assiduously and boldly with the permission of an overly indulgent Court.

Quite obviously, the probing of the prospective jurors as to whether their sensitivity to the word "pimp" would tend to prejudice them *so as to prevent their giving the defense* a fair trial bespeaks a tender solicitude which is as counterfeit as a pink nine dollar bill.

REASONS FOR GRANTING THE WRIT.

What was done here by the trial Court quo ad the "pimp" admission was clearly in violation of the rule laid down by this Court in *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L. Ed. 2d 908 (1964). The fallacy of the trial Court's action, and the sanction given to same by the Fifth Circuit, lies in the assumption: (a) That simply because this case was tried before the effective date of the "four warnings" rule of *Miranda,* only a token inquiry need be made as to voluntariness AND WITHOUT WITHDRAWING THE JURY; (b) That a highly incriminatory statement, made by an accused after being in custody for over a month was not to be treated as a confession or incriminating statement at all, but was to be equated with such routine matters as the taking of "mug shots", fingerprints, etc.

Several pre-*Miranda* cases make clear that, since *Jackson v. Denno, supra,* decided in 1964, the requirement of a serious inquiry, out of the presence of the jury, is essential to due process. Among these we

find *Luck v. United States*, 348 F. 2d 763, decided by the U.S. Court of Appeals for the District of Columbia in 1965. *Luck, supra,* was with us long before *Miranda* burst upon the scene. In the *Luck* case the Court declared (at page 766, footnote 2, of 348 F. 2d):

> "The frivolity of the objection *was not established simply by the Court's canvassing the police officer's opinion as to the voluntariness of the admission.*" (Emphasis added.)

That is precisely what was done here. As noted above, when the defense objected to the testimony of the Deputy Sheriff as to the purported "pimp" admission, the trial Judge simply asked the Deputy a few perfunctory questions as to whether the statement was made voluntarily. Moreover, everything was done in the presence of the jury and the accused was forced either to waive his rights against self-incrimination by taking the stand to rebut the testimony of the officer or bear the obviously prejudicial effect of said testimony by remaining silent.

What was done in the instant case was a "throwback", to what might have been due process before the Civil War but cannot be treated as such in modern times. The Fifth Circuit here blandly assumes that, because *Miranda* was not applicable per se, it was permissible to revert to a somewhat medieval inquiry as to voluntariness. Such errors of thinking and mechanical approaches to the problems presented by in-custody interrogations by police, was interdicted by this Court in *Davis v. North Carolina*, 384

U.S. 737, 16 L. Ed. 2d 895, 86 S. Ct. 1761 (1966). There, on the same day that the Johnson theory of non-retroactivity of *Miranda* was enunciated, Your Honors declared (at page 897 of 16 L. Ed. 2d):

> "As we pointed out in Johnson, however, the nonretroactivity of the decision in Miranda *does not affect the duty of courts to consider claims that a statement was taken under circumstances which violate standards of voluntariness which had begun to evolve long prior to our decisions in Miranda and Escobedo v. Illinois*, 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1738." (Emphasis added.)

In the instant case, after noting that the *Miranda* rules are inapplicable because of the time factor, the Fifth Circuit disposes of the entire issue of admissibility of this highly prejudicial inculpatory, in-custody, admission in one sentence. Thus, on page 3 of its opinion (See Appendix) the Fifth Circuit declares:

> "Since Williams' statement was totally voluntary and made during routine prison fingerprinting, 'mugging' and identification, his statement is admissible without the necessity of the customary constitutional warnings, such as those stated in *Escobedo. See United States v. Feinberg*, 2 Cir., 1967, 383 F. 2d 60, 69; *United States v. Kelly*, 2 Cir., 1932, 55 F. 2d 67; and *Schmerber v. State of California*, 384 U. S. 757, 763, 764, 86 S. Ct. 1826, 1832 (1966)."

Here the "weasel words" are "TOTALLY VOLUNTARY". We have quoted above the entire evidence produced as to the nature of the admission and its purported voluntariness. Clearly, this perfunctory inquiry by the Court, in the presence of the jury, cannot be equated with a serious inquiry as to voluntariness. Aside from the fact that no hearing was had out of the presence of the jury, and required in *Denno, supra* and reechoed in *Luck, supra,* the evidence upon which the conclusion of the trial court was reached is reviewable on appeal and by this Court. See *Smith v. United States,* 268 F. 2d 416 (Ninth Circuit, 1959).

Can anyone seriously believe that this accused, after being in custody for over a month and awaiting trial on a kidnapping charge tied in inextricably with a prostitution objective, would casually admit that he was a "pimp"? If made at all, the statement must have been made jocosely but it was used most seriously by the prosecution in closing argument when the United States Attorney told the jury (R. 227):

> "Now on this issue, what was her motive? There is a self-admitted pimp right there. He admitted it. You heard Mr. Curnan get on the stand and say 'I asked him what his occupation was'. He had the gall to admit he was a pimp."

INFLAMMATORY REMARKS.

In addition to the highly unfair tactics pursued during voir dire examination and noted above, the Gov-

ernment continued to indulge in highly inflammatory argument to the very end of the case. These remarks are noted particularly at R. 230, et seq. and the prosecutor asked the jury:

> "Where can this girl turn now? You ever think what you are putting that girl back into, *are you condemning her to a life of prostitution*" etc. See also argument at R. 248.

This was not only a rank appeal to emotions but was a grossly inaccurate description of the position of the parties. We are dealing here with a woman who had admittedly pursued a life of prostitution for years AND WAS CONSIDERING MARRYING THE MAN NOW CHARGED AS HER ABDUCTOR. (R. 217, 218.)

CONCLUSION.

The net effect of injecting this "pimp" image via the confession or admission was to supply the key evidence as to the purpose of the trip back to Louisiana. Save for that purported confession the jury had nothing before it but the unsupported word of an ingenious prostitute who was drawing military subsistence payments from one fiancee while toying with marrying the accused.

For the foregoing reasons we respectfully submit that a writ of certiorari should issue herein, that the

judgment below should be reversed and a new trial ordered.

Respectfully submitted,

G. W. GILL, SR.,
GEO. M. LEPPERT,
1707 Pere Marquette Bldg.,
New Orleans, La.,
Phone: 524-0147,
Attorneys for Petitioners.

CERTIFICATE OF SERVICE.

I, G. Wray Gill, Sr., of counsel for petitioner in the foregoing application for certiorari, am a member in good standing of the bar of the Supreme Court of the United States and I certify that copies of the foregoing petition have been served upon the Solicitor General of the United States and the United States Attorney for the Eastern District of Texas, Beaumont Division by mailing same, postage prepaid and properly addressed to their respective offices on the ... day of May, 1968.

May ..., 1968

G. W. GILL, SR.

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